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Chow Kon Yeow v Tan Sri Dato' Tan Kok Ping

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HIGH COURT (PENANG) — CIVIL SUIT NO PA-23 NCvC-1-01 OF
2024
QUAY CHEW SOON J
3 DECEMBER 2024

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Tort — Defamation — Defamatory statements — Slander and libel — Statements made at press conference subsequently published in various newspapers — Whether each libellous publication stood on its own as distinct cause of action — Whether statements referred to plaintiff — Whether statements defamatory — Whether defendant succeeded in raising defences — Whether defendant actuated by malice in making statements

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The plaintiff ('P') was the Chief Minister of the state of Penang. By virtue of his position as the Chief Minister of Penang, he held the position of chairman in the Penang Development Corporation ('PDC'). The PDC made an announcement that it would be collaborating with Umech Land Sdn Bhd ('Umech Land') to carry out the Batu Kawan ('BKIP 2 project'). A joint development agreement ('JDA') was entered between the PDC and Umech Land. However, the JDA did not go through and PDC terminated the JDA. According to P, the reason for the termination was because there was a change in the ownership of Umech Land which was not disclosed to or approved by the PDC. PDC thereafter issued a media statement to announce the termination of the JDA. In the same media statement, the PDC announced its intention to invite potential investors to tender for the development of the Batu Kawan ('BKIP 2 project') in line with the open tender process to select a suitable partner to work with the PDC on the development of its land. P then commenced a cause of action against D, the Life Honorary President of the Penang Chinese Chamber of Commerce ('Chamber') for slander and libel. The cause of action for slander emanated from a press conference held at the official premise of the Chamber ('said press conference') where D had uttered words in Mandarin, which translated into the national language read — 'dari sudut ini, saya rasa pengerusi PDC kita itu yang juga Ketua Menteri kita kelihatan benar-benar tak cekap, tak arif dan tak tahu malu berhubung perkara ini' ('impugned statement'). The sting of the defamation lay in the three words, namely 'tak cekap, tak arif, tak tahu malu' ('three offensive words'). The English translation of those three offensive words was 'incompetent, ignorant, shameless'. The cause of action for libel arose from D's act of causing the publication of the impugned statement in the six Chinese newspapers and the English daily. P pleaded that the natural and ordinary meaning of the impugned statement could be comprehended bore defamatory imputations.

Further, the fact that the impugned statement was published by leading Chinese daily newspapers and an English daily which enjoyed high volume of readership and subscription, P alleged that the injury to his reputation was of a devastating magnitude. On the contrary, D maintained that: (a) the impugned statement was not defamatory; and (b) the tone used in the said press conference was one seeking for explanation and improvement on the procurement of the PDC's project, in particular the BKIP 2 project. The issues that arose for determination were: (i) whether the impugned statement was defamatory of P; (ii) if yes, whether D could rely on the defences of justification, fair comment and qualified privilege; and (iii) whether D was actuated by malice in making the impugned statement.

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Held, allowing the plaintiff's claim with costs:

- (1) P was the target of the impugned statement. The impugned statement referred to P in his position as the Chief Minister of the state of Penang. It was imperative that the Chief Minister of Penang possesses an impeccable character and a high level of integrity. Therefore, when an influential figure as D accused P of being incompetent, ignorant and shameless, the accusation had the propensity to decimate P's standing in the estimation of right-thinking members of the society. P had established on a balance of probabilities the defamatory imputations carried by the impugned statement and was capable of exciting against P the adverse opinion of others. They also have the tendency to lower P in the estimation of right-thinking members of the society. In the premises, the impugned statement was defamatory of P (see paras 27 & 33–34).
- (2) A person who caused another to publish a defamatory statement or article was liable for such publication. By convening a press conference and making a speech with full knowledge that his statements were recorded by the members of the press, D intended to have his statements reported in the newspapers, whose reporters were present at the said press conference. D was therefore liable for defaming P through the publications in the Chinese newspapers and the English daily (see paras 38 & 40).
- (3) Whatever laudable reasons D may have had to convene the said press conference, there was no cause for him to single out P for public humiliation by describing him as incompetent, ignorant and shameless. PDC was a corporate body with its distinct legal personality. As a separate legal entity, the PDC was responsible for its actions. The explanation which P gave to the Chamber on the various complaints about the BKIP 2 project was an explanation given on behalf of the PDC. P was not making the statement on his own accord, but on behalf of the PDC. Hence, there was no basis for D to smear P with the three offensive words. There was nothing constructive in humiliating the Chief Minister of

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- A Penang by describing him as incompetent, ignorant and shameless. The impugned statement had no place in a press conference that was supposedly held to talk about a development project which the PDC had aborted (see paras 46–48).
- B (4) D stated that the reason for convening the said press conference was due to an article published in *The Edge Malaysia* newspaper issue ('said article'). After the said article was published, 'the issues arising from and related to BKIP 2 project were simmering in the public sphere'. D claimed that 'numerous media approached the Chamber for comments' about the said article. Therefore, according to D, the said press conference was held 'with the primary objective of discussing the BKIP 2 issues'. However, D's reason for convening the said press conference was unconvincing. Firstly, D relied totally on the said article which had no evidential value. Secondly, the said article made no mention of the fact that the JDA had been terminated and the BKIP 2 project would not materialise. It was apparent from its contents that the authors of the said article wrote it on the assumption that the JDA was still in existence and the BKIP 2 project was geared to proceed. In short, the said article, which D heavily relied upon, was a stale article. Clearly, there was no necessity to convene the said press conference. And a fortiori, there was no justification for D to call P incompetent, ignorant and shameless (see paras 67–68 & 70).
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- F (5) D had failed to establish the defence of justification. The defamatory imputation was that P, as the Chief Minister of Penang, was incompetent, ignorant and shameless. Considering the circumstances under which the impugned statement was uttered, D was not justified in describing P in those terms. Even if the JDA was a mistake on the part of the PDC, this had been superseded by an important event, which was the termination of the JDA. At the time of the said press conference, there was no justification for D to make the impugned statement. Section 8 of the Defamation Act 1957 would be applicable if the defamatory imputations had been partly proven to be true, while the unproven imputation did not materially injure P's reputation. But that was not the case here. D's dependence on s 8 of the Defamation Act 1957 was misplaced (see paras 73, 76 & 80).
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- I (6) The court disagreed with D's assertion that the impugned statement was his comment on the manner in which P, as the chairman of the PDC, handled the BKIP 2 project. It was his opinion that P was incompetent, ignorant and shameless when undertaking the BKIP 2 project. Besides, the use of phrases like 'saya rasa' (I feel) and 'kelihatan' (appears) indicated that D was expressing his view rather than making a factual statement. When D uttered the impugned statement, he was not expressing an opinion or commenting on anything. He was making an

allegation of fact on the character of P. He accused P of being incompetent, ignorant and shameless. The accusation was made in the context of P's position as the Chief Minister of Penang. As such, the impugned statement made by D did not qualify as comment (see paras 83–84).

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- (7) In order to erect the defence of fair comment, D should have laid the foundation made of sufficient substratum of facts. These facts must be true. Here, the harsh words which make up the sting of the defamation were not based on any facts truly stated. Since the BKIP 2 project ceased to exist upon the termination of the JDA, there was no substratum of facts which were true and existing at the time of the said press conference from which D could draw inference in support of the defence of fair comment (see paras 86 & 88).

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- (8) The said press conference was convened to discuss on a subject that was no longer in existence. D alluded to a stale article from *The Edge* to launch his attack on P. At the time of the said press conference, the JDA had already been terminated and the BKIP 2 project ceased to exist. Public interest was not served by having a discourse on something that did not exist or about events of the past. Hence, there was no public interest element associated with the impugned statement. Further, D was actuated by malice in uttering the impugned statement (see paras 90 & 113).

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- (9) Having admitted that the PDC did the right thing to terminate the JDA and initiate an open tender process for the development of its land, it was not fair for D to accuse the PDC's chairman of being incompetent, ignorant and shameless. Moreover, D admitted that after the termination of the JDA, whatever issues the Chamber had with the BKIP 2 project were laid to rest. It was unfair for D to revive the issues just to make the impugned statement. No fair-minded person would have honestly described the Chief Minister of Penang in the manner that was done by D through the usage of the three offensive words. In the premises, the defence of fair comment could not avail to D. In similar vein, the occasion on which D made the impugned statement was no longer privileged because the subject for which the said press conference was convened was no longer in existence. D could not resort to the defence of qualified privilege (see paras 92 & 102).

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- (10) There were seven libellous publications ie in six Chinese newspapers and one English daily. D submitted that each libellous publication stood on its own as distinct cause of action. Even so, the court was not in favour of making a separate award for each and every publication or republication. Taking into account: (a) the position and public standing of P as the Chief Minister of the state of Penang; (b) the grave nature of the three offensive words; (c) D's plea of the defence of justification and its pursuit

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- A at the trial, which failed; and (d) the absence of remorse or regret on the part of D, the court granted global damages in the sum of RM 350,000 to P. No aggravated damages were awarded to ensure that awards were not excessive and to avoid 'double counting'. As there was no evidence that D made the impugned statement with a view to profit or to enrich himself,
- B no exemplary damages was warranted (see paras 125–128).

(11) The court declined to exercise its discretion to order an apology. There was no indication from D of any willingness to apologise to P. On the contrary, D had pleaded the defence of justification and testified that the impugned statement he made was justified. Willingness to apologise should be sincere and must be conceived in a contrite heart. It would be counterproductive to force a person to apologise when he was steadfast on his stand that the wrong, he did was supposedly right (see para 129).

D **[Bahasa Malaysia summary]**

- Plaintif ('P') adalah Ketua Menteri Pulau Pinang. Berdasarkan kedudukannya sebagai Ketua Menteri Pulau Pinang, beliau memegang jawatan pengerusi dalam Perbadanan Pembangunan Pulau Pinang ('PDC'). PDC membuat pengumuman bahawa ia akan bekerjasama dengan Umech Land Sdn Bhd ('Umech Land') untuk melaksanakan Batu Kawan ('projek BKIP 2').
- E Perjanjian pembangunan bersama ('JDA') telah dimeterai antara PDC dan Umech Land. Bagaimanapun, JDA tidak diteruskan dan PDC menamatkan JDA. Menurut P, punca penamatan itu adalah kerana terdapat perubahan dalam pemilikan Umech Land yang tidak didedahkan kepada atau diluluskan
- F oleh PDC. PDC selepas itu mengeluarkan kenyataan media bagi mengumumkan penamatan JDA. Dalam kenyataan media yang sama, PDC mengumumkan hasratnya untuk menjemput pelabur berpotensi untuk mengemukakan tender bagi pembangunan Batu Kawan ('projek BKIP 2') selaras dengan proses tender terbuka untuk memilih rakan kongsi yang sesuai
- G untuk bekerjasama dengan PDC dalam pembangunan tanahnya. P kemudian memulakan tindakan terhadap D, Presiden Kehormat Seumur Hidup Dewan Perniagaan Cina Pulau Pinang ('Dewan') atas slander dan libel. Kausa tindakan slander adalah berpunca daripada sidang media yang diadakan di premis rasmi Dewan ('sidang akhbar tersebut') di mana D telah mengeluarkan perkataan
- H dalam bahasa Mandarin, yang diterjemahkan ke dalam bahasa kebangsaan yang dibaca — 'dari sudut ini, saya rasa pengerusi PDC kita itu yang juga Ketua Menteri kita kelihatan benar-benar tak cekap, tak arif dan tak tahu malu berhubung perkara ini' ('kenyataan yang disangkal'). Sengatan fitnah itu terletak pada tiga perkataan iaitu 'tak cekap, tak arif, tak tahu malu' ('tiga
- I perkataan yang disangkal'). Terjemahan bahasa Inggeris bagi tiga perkataan yang menyinggung itu adalah 'incompetent, ignorant, shameless'. Kausa tindakan untuk libel timbul daripada perbuatan D yang menyebabkan penerbitan kenyataan yang disangkal dalam enam akhbar Cina dan harian Inggeris. P memplidkan bahawa maksud semula jadi dan biasa bagi kenyataan

yang disangkal itu boleh difahami mengandungi tuduhan fitnah. Tambahan pula, fakta bahawa kenyataan yang disangkal itu diterbitkan oleh akhbar harian Cina terkemuka dan akhbar berbahasa Inggeris yang mempunyai jumlah pembaca dan langganan yang tinggi, P mendakwa bahawa kerosakan terhadap reputasinya adalah sangat besar. Sebaliknya, D berpendapat bahawa: (a) kenyataan yang disangkal itu tidak memfitnah; dan (b) nada yang digunakan dalam sidang akhbar tersebut adalah meminta penjelasan dan penambahbaikan mengenai perolehan projek PDC, khususnya projek BKIP 2. Isu-isu yang timbul untuk penentuan adalah: (i) sama ada kenyataan yang disangkal itu memfitnah P; (ii) jika ya, sama ada D boleh bergantung pada pembelaan justifikasi, ulasan berpatutan dan perlindungan bersyarat; dan (iii) sama ada D telah digerakkan oleh niat jahat dalam membuat kenyataan yang disangkal itu.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

- (1) P adalah sasaran pernyataan yang disangkal. Kenyataan yang disangkal itu merujuk kepada P dalam jawatannya sebagai Ketua Menteri Pulau Pinang. Ia adalah penting bahawa Ketua Menteri Pulau Pinang mempunyai perwatakan hebat dan tahap integriti yang tinggi. Oleh itu, apabila seorang tokoh yang berpengaruh seperti D menuduh P sebagai tidak cekap, tidak arif dan tidak tahu malu, tuduhan tersebut mempunyai kecenderungan untuk meruntuhkan pendirian P dalam anggaran ahli masyarakat yang berfikir benar. P telah menetapkan atasimbangan kebarangkalian tuduhan fitnah yang dibawa oleh pernyataan yang disangkal itu dan mampu menarik pendapat buruk orang lain terhadap P. Mereka juga mempunyai kecenderungan untuk menurunkan P dalam anggaran ahli masyarakat yang berfikir betul. Di dalam premis itu, kenyataan yang disangkal adalah memfitnah P (lihat perenggan 27 & 33–34).
- (2) Seseorang yang menyebabkan orang lain menyiarkan kenyataan atau artikel yang berunsur fitnah adalah bertanggungjawab bagi penerbitan itu. Dengan mengadakan sidang akhbar dan membuat ucapan dengan penuh pengetahuan bahawa kenyataannya telah dirakam oleh ahli akhbar, D berhasrat untuk melaporkan kenyataannya di akhbar, yang wartawannya hadir pada sidang akhbar tersebut. Oleh itu D bertanggungjawab kerana memfitnah P melalui penerbitan dalam akhbar Cina dan harian Inggeris (lihat perenggan 38 & 40).
- (3) Walau apa pun alasan D untuk mengadakan sidang akhbar tersebut, tidak ada sebab untuk beliau memilih P untuk dihina secara terbuka dengan menyifatkan beliau sebagai tidak cekap, tidak arif dan tidak tahu malu. PDC adalah sebuah badan korporat dengan personaliti undang-undangnya yang tersendiri. Sebagai entiti undang-undang yang berasingan, PDC bertanggungjawab atas tindakannya. Penjelasan yang P

- A berikan kepada Dewan mengenai pelbagai aduan mengenai projek BKIP 2 adalah penjelasan yang diberikan bagi pihak PDC. P tidak membuat kenyataan itu atas kerelaan dirinya, tetapi bagi pihak PDC. Oleh itu, tiada asas untuk D memburukkan P dengan tiga perkataan yang menyinggung perasaan itu. Tidak ada yang membina dalam mengaibkan
- B Ketua Menteri Pulau Pinang dengan menyifatkan beliau sebagai tidak cepak, tidak arif dan tidak tahu malu. Kenyataan yang disangkal itu tidak mendapat tempat dalam sidang akhbar yang kononnya diadakan untuk membincangkan projek pembangunan yang telah digugurkan oleh PDC (lihat perenggan 46–48).
- C (4) D menyatakan bahawa alasan untuk mengadakan sidang akhbar tersebut adalah disebabkan oleh artikel yang diterbitkan dalam terbitan akhbar *The Edge Malaysia* ('artikel tersebut'). Selepas artikel tersebut diterbitkan, 'isu yang timbul daripada dan berkaitan dengan projek BKIP 2 semakin membara di ruang awam'. D mendakwa bahawa 'banyak media mendekati Dewan untuk komen' mengenai artikel tersebut. Oleh itu, menurut D, sidang media tersebut diadakan 'dengan objektif utama membincangkan isu BKIP 2'. Bagaimanapun, alasan D untuk mengadakan sidang akhbar tersebut adalah tidak meyakinkan. Pertama, D bergantung sepenuhnya pada artikel tersebut yang tidak mempunyai nilai keterangan. Kedua, artikel tersebut tidak menyebut fakta bahawa JDA telah ditamatkan dan projek BKIP 2 tidak akan menjadi kenyataan. Jelas daripada kandungannya bahawa pengarang artikel tersebut menulisnya dengan andaian bahawa JDA masih wujud dan projek BKIP 2 telah bersedia untuk diteruskan. Ringkasnya, artikel tersebut, yang D bergantung sepenuhnya, adalah artikel basi. Jelas sekali, tiada keperluan untuk mengadakan sidang media tersebut. Dan kesimpulannya, tidak ada justifikasi bagi D untuk memanggil P tidak cepak, tidak arif dan tidak tahu malu (lihat perenggan 67–68 & 70).
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- G (5) D telah gagal untuk mewujudkan pembelaan justifikasi. Tuduhan fitnah itu adalah P, sebagai Ketua Menteri Pulau Pinang, tidak cepak, tidak arif dan tidak tahu malu. Memandangkan keadaan di mana pernyataan yang disangkal itu diucapkan, D tidak memberikan justifikasi untuk menerangkan P dalam istilah tersebut. Walaupun JDA adalah kesilapan di pihak PDC, ini telah digantikan oleh peristiwa penting, iaitu penamatan JDA. Pada masa sidang media tersebut, tiada justifikasi untuk D membuat kenyataan yang disangkal itu. Seksyen 8 Akta Fitnah 1957 akan terpakai jika tohmahan fitnah sebahagiannya telah terbukti benar, manakala tohmahan yang tidak terbukti tidak mencederakan reputasi P secara material. Tetapi ianya tidak berlaku di sini. Kebergantungan D pada s 8 Akta Fitnah 1957 adalah salah arah (lihat perenggan 73, 76 & 80).
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- I (6) Mahkamah tidak bersetuju dengan penegasan D bahawa kenyataan yang

disangkal itu adalah ulasannya mengenai cara P, sebagai pengerusi PDC, mengendalikan projek BKIP 2. Beliau berpendapat bahawa P tidak cekap, tidak arif dan tidak tahu malu semasa menjalankan projek BKIP 2. Selain itu, penggunaan frasa seperti 'saya rasa' (*I feel*) dan 'kelihatan' (*appears*) menunjukkan bahawa D menyatakan pandangannya berbanding membuat kenyataan fakta. Apabila D mengeluarkan kenyataan yang disangkal itu, dia tidak menyatakan pendapat atau mengulas apa-apa. Dia membuat dakwaan fakta mengenai watak P. Dia menuduh P sebagai tidak cekap, tidak arif dan tidak tahu malu. Tuduhan itu dibuat dalam konteks kedudukan P sebagai Ketua Menteri Pulau Pinang. Oleh itu, kenyataan yang disangkal yang dibuat oleh D tidak layak sebagai ulasan (lihat perenggan 83–84).

- (7) Untuk menegakkan pembelaan komen berpatutan, D sepatutnya meletakkan asas yang diperbuat daripada substratum fakta yang mencukupi. Fakta ini mesti benar. Di sini, kata-kata kasar yang membentuk sengatan fitnah itu tidak berdasarkan fakta yang benar-benar dinyatakan. Memandangkan projek BKIP 2 tidak lagi wujud selepas penamatan JDA, tiada substratum fakta yang benar dan wujud pada masa sidang akhbar tersebut yang D boleh membuat kesimpulan untuk menyokong pembelaan komen berpatutan (lihat perenggan 86 & 88).
- (8) Sidang media tersebut telah diadakan untuk membincangkan perkara yang tidak lagi wujud. D merujuk kepada artikel lapuk dari *The Edge* untuk melancarkan serangannya terhadap P. Pada masa sidang media tersebut, JDA telah pun ditamatkan dan projek BKIP 2 tidak lagi wujud. Kepentingan awam tidak dipertahankan dengan mengadakan wacana tentang sesuatu yang tidak wujud atau tentang peristiwa masa lampau. Oleh itu, tiada unsur kepentingan awam dikaitkan dengan kenyataan yang disangkal itu. Selanjutnya, D telah digerakkan oleh niat jahat dalam mengeluarkan kenyataan yang disangkal (lihat perenggan 90 & 113).
- (9) Setelah mengakui bahawa PDC melakukan perkara yang betul untuk menamatkan JDA dan memulakan proses tender terbuka untuk pembangunan tanahnya, ia adalah tidak adil bagi D untuk menuduh pengerusi PDC sebagai tidak cekap, tidak arif dan tidak tahu malu. Lebih-lebih lagi, D mengakui bahawa selepas penamatan JDA, apa sahaja isu yang dihadapi Dewan dengan projek BKIP 2 telah diselesaikan. Ia adalah tidak adil bagi D untuk menghidupkan semula isu-isu hanya untuk membuat kenyataan yang disangkal. Tidak ada orang yang berfikir adil yang akan secara jujur menyifatkan Ketua Menteri Pulau Pinang dengan cara yang dilakukan oleh D melalui penggunaan tiga perkataan yang menyinggung perasaan itu. Di dalam premis itu, pembelaan komen berpatutan tidak dapat membantu D. Dalam nada

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- A yang sama, peristiwa di mana D membuat kenyataan yang dipertikaikan tidak lagi mempunyai perlindungan kerana subjek sidang akhbar tersebut telah tidak wujud lagi. D tidak boleh menggunakan pembelaan perlindungan bersyarat (lihat perenggan 92 & 102).
- B (10) Terdapat tujuh penerbitan fitnah iaitu dalam enam akhbar Cina dan satu akhbar harian Inggeris. D berhujah bahawa setiap penerbitan libel berdiri sendiri sebagai kausa tindakan yang berbeza. Walaupun begitu, mahkamah tidak memilih untuk membuat award berasingan bagi setiap penerbitan atau penerbitan semula. Mengambil kira: (a) posisi dan kedudukan awam P sebagai Ketua Menteri Pulau Pinang; (b) sifat serius
- C tiga perkataan yang menyinggung perasaan; (c) plid D terhadap pembelaan justifikasi dan usahanya dalam perbicaraan, yang gagal; dan (d) ketiadaan penyesalan atau kekesalan di pihak D, mahkamah memberikan ganti rugi global berjumlah RM 350,000 kepada P. Tiada
- D ganti rugi teruk diberikan untuk memastikan award tidak berlebihan dan mengelakkan 'double counting'. Memandangkan tiada keterangan bahawa D membuat kenyataan yang disangkal dengan tujuan untuk mengaut keuntungan atau memperkayakan dirinya, tiada ganti rugi teladan yang wajar (lihat perenggan 125–128).
- E (11) Mahkamah enggan menggunakan budi bicaranya untuk memerintahkan permohonan maaf. Tiada petunjuk daripada D tentang sebarang kesediaan untuk memohon maaf kepada P. Sebaliknya, D telah memplidkan pembelaan justifikasi dan memberi keterangan bahawa
- F kenyataan yang disangkal yang dibuatnya adalah wajar. Kesanggupan untuk meminta maaf haruslah ikhlas dan mesti diilhamkan dalam hati yang redha. Ia adalah tidak produktif untuk memaksa seseorang meminta maaf apabila dia berpegang teguh pada pendiriannya bahawa salah, yang dilakukannya kononnya betul (lihat perenggan 129).]
- G **Cases referred to**
Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494; [2005] 2 CLJ 569, CA (refd)
Dato' Ahmad Rejal Arbee & Anor v Mahfuz Omar [2015] 6 CLJ 149, CA (refd)
Dato' Musa Hitam v SH Al Attas & Ors [1991] 2 CLJ Rep 487, HC (refd)
- H *Datuk Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad & Anor* [1984] 1 MLJ 97; [1983] CLJ Rep 521 (refd)
Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 MLJ 394; [2012] 2 CLJ 619, HC (refd)
Adam v Ward [1917] AC 309; [1916–17] All ER Rep 157, HL (refd)
- I *Blackshaw v Lord and another* [1983] 2 All ER 311, CA (refd)
Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya' Kub [2005] 3 MLJ 485; [2005] 3 AMR 1, CA (refd)
Credit Guarantee Corp Malaysia Bhd v SSN Medical Products Sdn Bhd [2017] 2 MLJ 629; [2017] 6 CLJ 129, CA (refd)

- Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242; [2014] 3 CLJ 560, CA (refd) **A**
- Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Mohd Rafizi bin Ramli* [2022] 3 MLJ 758; [2022] 5 CLJ 487, FC (folld)
- Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2021] 2 MLJ 577; [2021] 4 CLJ 327, FC (refd) **B**
- Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133; [2018] 1 CLJ 145, FC (refd)
- Dr Chong Eng Leong v Tan Sri Harris bin Mohd Salleh* [2017] 4 MLJ 611; [2017] 10 CLJ 657, CA (refd) **C**
- Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor* [1978] 1 MLJ 75 (refd)
- Horrocks v Lowe* [1975] AC 135, HL (refd)
- Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 (refd)
- Keluarga Communication v Normala Samsudin* [2006] 2 MLJ 700; [2006] 2 CLJ 46, CA (refd) **D**
- Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385, CA (folld)
- Lim Guan Eng v Ruslan bin Kassim and another appeal* [2021] 2 MLJ 514; [2021] 3 MLRA 207; [2021] 4 CLJ 155, FC (folld)
- Malayan Banking Bhd v Yeo Sun Tong* [1999] 6 MLJ 377, HC (refd)
- Mohamed Hafiz Mohamed Nordin v Eric Paulsen and another appeal* [2019] 1 MLJ 580; [2018] CLJU 1731, CA (refd) **E**
- Mohd Rafizi bin Ramli v Dato' Sri Dr Mohamad Salleh bin Ismail & Anor* [2019] 6 MLJ 587; [2020] 1 CLJ 498, CA (refd)
- Parkes v Prescott and another* (1869) LR 4 Exch 169 (refd)
- Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee* [2019] 3 MLJ 720; [2019] 2 MLRA 345; [2019] 3 CLJ 729, FC (refd) **F**
- Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609, HL (refd)
- S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233, SC (refd) **G**
- Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187; [2015] 8 CLJ 471, FC (refd)
- Syed Nadri Syed Harun & Anor v Lim Guan Eng and other appeals* [2019] 4 MLJ 259; [2019] 2 CLJ 631, CA (refd)
- Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas & Ors* [2018] 12 MLJ 98; [2018] 10 CLJ 222, CA (refd) **H**
- Tony Pua Kiam Wee v Dato' Sri Mohd Najib bin Tun Hj Abdul Razak* [2018] 4 MLJ 192; [2018] 3 CLJ 522, CA (refd)
- Tradewinds Properties Sdn Bhd v Zulhkipple bin A Bakar & Ors* [2019] 1 MLJ 421; [2019] 2 CLJ 261, CA (refd) **I**
- Tun Datuk Patinggi Haji Abdul-Rahman Ya'Kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, HC (refd)
- Utusan Melayu (M) Bhd v Othman bin Hj Omar* [2017] 2 MLJ 800, CA (refd)
- YB Dato' Dr Hasan bin Mohamed Ali lwn YB Mulia Tengku Putra bin Tengku*

A *Awang dan lain-lain* [2010] 8 MLJ 269; [2010] 7 CLJ 856, HC (refd)

Legislation referred to

Defamation Act 1957 s 8

Evidence Act 1950 ss 45, 46

B Rules of Court 2012 O 18 r 7

Simon Murali (with Kok Yuen Lin) (Simon Murali & Co) for the plaintiff.
K Kirubakaran (with Kek Boon Wei and Lee Wen Qian) (Kek Ooi & Lee Hong) for the defendant.

C **Quay Chew Soon J:**

INTRODUCTION

D [1] This is an action by the plaintiff ('P') against the defendant ('D') for defamation. After a full trial, I allowed P's claim. Here are the grounds of my judgment.

BACKGROUND FACTS

E [2] P is the Chief Minister of the state of Penang. By virtue of his position as the Chief Minister of Penang, he holds the position of chairman in the Penang Development Corporation ('PDC'). The PDC operates as the development arm of the state government of Penang. Its primary objective is to propel the social and economic development in the state of Penang.

F [3] D is the Life Honorary President of the Penang Chinese Chamber of Commerce ('Chamber'). The Chamber is a trade organisation that was set up with the objective of improving trade and industry and disseminating commercial information. The Chamber has submitted numerous memoranda to the government proposing recommendations for the economic betterment of Penang.

The letter dated 27 July 2023 from the Chamber to the PDC

H [4] On 27 July 2023, the Chamber issued a letter to the PDC. The letter bore the signatures of D and Dato' Seri Hong Yeam Wah in their respective capacities as the Chamber's Life Honorary President and the incumbent President. The contents of the letter pertain to a development project that was planned to be carried out on a land owned by the PDC in the area of Batu Kawan ('BKIP 2 project').

I [5] In the letter, the Chamber referred to the BKIP 2 project and made the following assertions: (i) that the PDC granted a letter of award to a company

known as Umech Construction Sdn Bhd (Umech Construction) to jointly develop a proposed mix development and industry project at Batu Kawan; (ii) that the PDC proposed to sell a piece of land, which it owns, to Umech Construction; and (iii) that the PDC intended to enter into a joint venture agreement with Umech Construction.

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[6] Then the Chamber made the following complaints: (i) that the PDC attempted to sell its land to Umech Construction at an undervalued price; (ii) that the PDC failed to consider whether the BKIP 2 project could be feasible and sustainable in view of the significant financial burden incumbent upon the PDC; (iii) that the PDC failed to uphold the underlying principles of accountability, transparency and integrity when it awarded the BKIP 2 project to Umech Construction without going through an open tender process; (iv) that Umech Construction was a small company, and thereby, the PDC's wisdom in carrying out the BKIP 2 project was questioned; (v) that Umech Construction was not securing the loan facilities in its own capacity to carry out its obligations under the BKIP 2 project but to involve another company with separate legal entity; and (vi) that the PDC has diverted from its vision and failed to uphold the interests of Penang and its people.

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[7] The PDC responded vide a letter dated 25 August 2023 to address the complaints. The signatory of the PDC's letter was P who signed as its chairman. The Chamber issued another letter dated 12 September 2023, which expressed its disappointment with the explanation given by the PDC. The PDC did not reply to this letter. The Chamber convened a press conference on 3 October 2023 to raise what it regarded as the unanswered queries. On 3 October 2023, P, as the chairman of the PDC, issued a press statement to address the various complaints raised by the Chamber vide its letter dated 27 July 2023.

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The joint development agreement

[8] On 21 September 2023, the PDC made an announcement through its Facebook page that it would be collaborating with Umech Land Sdn Bhd ('Umech Land') to carry out the BKIP 2 project. On 27 September 2023, a joint development agreement ('JDA') was entered between the PDC and Umech Land. According to P, although the PDC was initially approached by Umech Construction, the subsequent negotiation leading to the JDA was between the PDC and Umech Land. Therefore, the JDA and the negotiation that preceded it was between the PDC and Umech Land.

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A [9] However, the JDA did not go through. The PDC terminated the JDA. According to P, the reason for the termination is because there was a change in the ownership of Umech Land. Such change of ownership was not disclosed to or approved by the PDC.

B [10] On 16 October 2023, the PDC issued a media statement to announce the termination of the JDA. In the media statement, the PDC explained the reason for the termination. In the same media statement, the PDC announced its intention to invite potential investors to tender for the development of the
C Batu Kawan Industrial Park 2. According to P, this is in line with the open tender process to select a suitable partner to work with the PDC on the development of its land.

D [11] Through the publication of the media statement on 16 October 2023, the termination of the JDA became public knowledge. Then on 17 October 2023, Berita Harian reported the PDC's media statement in a news article captioned 'Lembaga PDC tamatkan perjanjian usahasama dengan Umech Land'. On the same day, an online news portal called Malaysia *Gazette* also reported the same. Thus by 17 October 2023, the termination of the JDA was
E already news in the public domain.

The press conference on 18 October 2023

F [12] On 18 October 2023, D convened a press conference at the official premise of the Chamber ('said press conference'). At his invitation, members of the press from various media agencies attended the said press conference. D uttered these words in Mandarin, which translated into the national language reads — 'Dari sudut ini, saya rasa pengerusi PDC kita itu yang juga Ketua
G Menteri kita kelihatan benar-benar tak cekap, tak arif dan tak tahu malu berhubung perkara ini' ('impugned statement'). The statements made by D, in particular the impugned statement, were recorded and taken down by the journalists who attended the said press conference.

H *The publication in the newspapers*

I [13] The impugned statement was published in six Chinese language newspapers. Namely: (i) *China Press*; (ii) *Guang Ming Daily*; (iii) *Kwong Wah Yit Poh*; (iv) *Nanyang Siang Pau*; (v) *Sin Chew Daily*; and (vi) *Oriental Daily*. They essentially reported that D has described P as 'tak cekap, tak arif, tak tahu malu'. An English daily, *The Star* issue of 19 October 2023 in a news article captioned 'Deal off, CM still under fire', reported that D has labelled P as 'incompetent, ignorant, shameless'.

THE PLAINTIFF'S CASE

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[14] P's cause of action against D is for slander and libel. The cause of action for slander emanates from the impugned statement that D uttered at the said press conference. The cause of action for libel arise from D's act of causing the publication of the impugned statement in the six Chinese newspapers and the English daily.

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[15] P pleaded that the natural and ordinary meaning of the impugned statement can be comprehended as follows, and that it bears the following defamatory imputations,:

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- (a) P is a person of shameless character and has no sense of shame. He has no dignity and respect;
- (b) P's behaviour is disgraceful. He has acted in a disgraceful manner;
- (c) P has no integrity and is dishonest;
- (d) P is incompetent. He is incapable of performing his official function or to carry out tasks entrusted to him;
- (e) P is ignorant and clueless on matters related to his work. He lacks intelligence and wisdom;
- (f) P is unfit and unqualified to occupy the office of Chief Minister of the state of Penang. He is unworthy and undeserving to hold such position. He does not possess the wisdom and intelligence that is expected and required of a person who holds such office; and
- (g) P is unworthy and undeserving to hold the position of chairman of the PDC. He does not have the character and credibility to hold the position of Chief Minister and also that of the PDC's chairman. He has brought disrepute to the public office he occupies.

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[16] Consequently, P was exposed to odium and public scandal. He was disparaged in his public office. The impugned statement has gravely injured his good name. The impugned statement has also diminished his standing in the estimation of right-thinking members of the society. Having regard to the fact that the impugned statement was published by leading Chinese daily newspapers and an English daily which enjoy high volume of readership and subscription, the injury to his reputation was of a devastating magnitude.

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[17] P seeks the following reliefs:

- (a) that D be ordered to issue a statement of apology to him, accompanied by a retraction of the impugned statement. Such apology shall be

A published in the newspaper and online portal which published the impugned statement; and

(b) that D be ordered to pay compensatory damages, which includes aggravated damages and exemplary damages, to him. In submissions, P requested a global award of RM2.5m calculated as follows:

B (i) RM150,000 as general damages for the slanderous statement;
(ii) RM2.1m as general damages for the seven libellous publications (RM300,000 for each publication); (iii) RM150,000 as aggravated damages; and (iv) RM100,000 as exemplary damages.

C THE DEFENDANT'S DEFENCE

[18] D does not deny publishing the impugned statement at the said press conference. During cross-examination, he has also admitted to causing the publication of the impugned statement in various newspapers.

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[19] However, D maintains that the impugned statement is not defamatory, when considered in the context of the said press conference together with the circumstances and various events that happened before it as a whole. The tone used in the said press conference was one seeking for explanation and improvement on the procurement of the PDC's project, in particular the BKIP 2 project. P had merely highlighted a sentence out of more than ten pages of transcript. P has taken the impugned statement in isolation and out of context.

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F [20] Further, D raised three specific pleas of defence, viz justification, fair comment and qualified privilege. D asserts that he was not actuated by malice in making the impugned statement.

G ISSUES TO BE TRIED

[21] The issues to be tried are these:

(a) whether the impugned statement is defamatory of P;

H (b) if the answer is affirmative, whether D can rely on the defences of justification, fair comment and qualified privilege; and

(c) whether D was actuated by malice in making the impugned statement.

I [22] It is my finding that P has successfully proven his case for defamation against D. The three essential elements of defamation have been established on a balance of probabilities. To wit: (i) that the impugned statement refers to him; (ii) that the impugned statement bears defamatory imputations against him; and (iii) that the impugned statement was published to a third person by D (see the Federal Court decision in *Raub Australian Gold Mining Sdn Bhd (in*

creditors' voluntary liquidation) v Hue Shieh Lee [2019] 3 MLJ 720 at p 736; [2019] 2 MLRA 345 at pp 356–357; [2019] 3 CLJ 729 at p 743).

[23] It is also my finding that the defences of justification, fair comment and qualified privilege have not been successfully proven. I further find that D acted with malice. As such, he is not entitled to rely on the defences of fair comment and qualified privilege. Here are my reasons.

THE IMPUGNED STATEMENT IS DEFAMATORY OF THE PLAINTIFF

[24] The relevant principles governing a cause of action in defamation can be summarised as these:

- (a) the words complained of must bear defamatory imputation. An imputation would be defamatory if its effect is to: (i) expose the plaintiff, in the eyes of the community, to hatred, ridicule or contempt; or (ii) lower him or her in their estimation; or (iii) cause him or her to be shunned and avoided by them;
- (b) the defamatory imputation must have the tendency to: (i) excite adverse opinion of others against the plaintiff; or (ii) lower the plaintiff in the estimation of right-thinking members of the society;
- (c) the defamatory nature of the words complained of is to be objectively assessed from the perspective of an ordinary and reasonable member of the society who is of average intelligence but able to read in between the lines with a degree of flexible thinking;
- (d) the words complained of must be considered in the context of the entire article in which it appears in order to appreciate its meaning and determine its defamatory nature;
- (e) the words complained of must refer to the plaintiff; and
- (f) the words complained of must have been published by the defendant or at his behest.

[25] See the Federal Court decisions in *Lim Guan Eng v Ruslan bin Kassim and another appeal* [2021] 2 MLJ 514; [2021] 3 MLRA 207; [2021] 4 CLJ 155; *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2021] 2 MLJ 577; [2021] 4 CLJ 327; the Court of Appeal decision in *Keluarga Communication v Normala Samsudin* [2006] 2 MLJ 700; [2006] 2 CLJ 46, the High Court decision in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'Kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, which was affirmed on appeal by the Court of Appeal in *Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya' Kub* [2005] 3 MLJ 485; [2005] 3 AMR 1.

- A [26] The impugned statement was uttered by D in Mandarin. The certified translation in the national language reads-‘Dari sudut ini, saya rasa pengerusi PDC kita itu yang juga *Ketua Menteri* kita kelihatan benar-benar *tak cekap, tak arif* dan *tak tahu malu* berhubung perkara ini.’ The sting of the defamation lies in the three words in Chinese which translation in the national language
- B reads-‘tak cekap, tak arif, tak tahu malu’ (‘three offensive words’). The English translation of those three offensive words is — ‘incompetent, ignorant, shameless’.
- C [27] There is no dispute that P was the target of the impugned statement. D described P in those three offensive words. In his evidence-in-chief, P explained the profound meaning of the three offensive words The relevant part of his testimony reads:
- D At this juncture, it is important that I emphasise that the *actual meaning and impact of the Chinese words* uttered by the defendant is difficult to be captured when translated into any other language. The context and essence of these words cannot be easily stated when translated into our National Language or any other language.
- E The words, especially the third word in Chinese “无耻” [ie shameless] has a profound meaning when *uttered in Chinese and heard by a Chinese audience*. The word is not only highly derogatory and extremely insulting, but the meaning and essence extends far beyond that. It is a word that a member of the Chinese community would not normally utter. If such word is directed at someone, the person who utters that word must have a deep hatred and enmity towards the person at whom the word is hurled. For the Chinese, and I am a Chinese, such a word is reserved for someone whom you want to humiliate and insult in the worst possible manner. Figuratively speaking, we use such word against someone whom we want to humiliate and shame to death. It is that serious.
- F
- G And when this terrible word is combined with the other two words ie “无能” [incompetent] and “无知” [ie ignorant], the effect is a complete destruction of the character, credibility and reputation of the person against whom these words are used. If these words are hurled at a leader or a person of high position in a public office, the impact of these words could degrade that person to the lowest level and desecrate his position in the worst way.
- H [28] D objected to this part of P’s evidence on the ground that it was not pleaded. However, I consider that P’s evidence in this regard is an expansion of what he has already pleaded in the statement of claim. Paragraphs 34.7 and 34.8 of the statement of claim read:
- I 34.7 The slanderous statement comprises Chinese words which are tremendously derogatory, highly offensive and extremely injurious to the character, credibility and reputation of a person.
- 34.8 The usage of these words clearly reflects the malicious mind of the defendant to defame the plaintiff.

[29] P's testimony above provides evidential dimension to the pleaded averments. In this regard, O 18 r 7 of the Rules of Court 2012 prohibits a party in a proceeding from pleading evidence. The said provision enjoins a party to plead 'a statement in a summary form of the material facts on which the party pleading relies for his claim ... but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits'. In line with O 18 r 7 of the Rules of Court 2012, P has pleaded the material facts as stated in paras 34.7 and 34.8 of the statement of claim.

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[30] The testimony of P, which D took objection, constitutes the evidence by which the pleaded facts are to be proved. P's testimony is an explanation as to why the impugned statement containing the three offensive words is derogatory. P's testimony is therefore relevant and admissible. The objection taken by D is overruled.

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[31] I accept P's explanation vis a vis the three offensive words. P is Chinese. His mother tongue is the Chinese language. He understands the depth and gravity of the impugned statement which contains the three offensive words. By his testimony, P has explained how a person of Chinese ethnicity and who speaks the Chinese language would have understood the impugned statement containing the three offensive words. The evidence given by him is factual in nature.

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[32] D submits that the sense in which the three offensive words were perceived by P is irrelevant in determining their natural and ordinary meaning. This is because those words must be looked at objectively regardless of the meaning comprehended by P (see the Court of Appeal decision in *Mohamed Hafiz Mohamed Nordin v Eric Paulsen and another appeal* [2019] 1 MLJ 580; [2018] CLJU 1731). I have no quarrel with that submission. Nevertheless, it is noteworthy that the members of the press who were invited by D to the said press conference are from the Chinese language newspapers. Objectively assessed from the perspective of a reasonable person who is of Chinese ethnicity and who is proficient in the Chinese language, I accept that the three offensive words can be understood to have the profound impact suggested by P.

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[33] The impugned statement refers to P in his position as the Chief Minister of the state of Penang. D laid emphasis on P's position when, in the impugned statement, he specifically identified P as the Chief Minister. P helms the public administration in the state of Penang. It is imperative that the Chief Minister of Penang possesses an impeccable character and a high level of integrity. He must be perceived by the general public as capable and intelligent in the performance of his duties. He must command the respect of the people of the state of Penang and the functionaries who serve the state government.

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A Therefore, when an influential figure as D accuses P of being incompetent, ignorant and shameless, the accusation has the propensity to decimate P's standing in the estimation of right-thinking members of the society.

B [34] In the premises, it is my finding that the impugned statement is defamatory of P. He has established on a balance of probabilities the defamatory imputations carried by the impugned statement. They are capable of exciting against P the adverse opinion of others. They also have the tendency to lower P in the estimation of right-thinking members of the society. Hence,
C P has been defamed, whereby his character, credibility and reputation have been gravely injured.

THE IMPUGNED STATEMENT WAS PUBLISHED

D [35] D does not dispute the fact that he published the impugned statement at the said press conference. D's speech at the said press conference contains the impugned statement.

E [36] The publications by the six Chinese newspapers and the English daily are essentially repetition of the impugned statement with some editorial amendments. Notably, they contain the three offensive words. Those three offensive words constitute the sting of the defamation in the publications. The publications read in the context of the respective articles in which they appear are defamatory of P.

F [37] D asserts that he has no control over the six Chinese newspapers and the English daily. Hence, he should not be held responsible for their publications. I disagree.

G [38] A person who causes another to publish a defamatory statement or article is liable for such publication. This legal proposition was posited by the authors of *Carter-Ruck on Libel and Privacy* (6th Ed, Lexis Nexis) wherein they stated (at p 110 para 5.28):

H A person who authorises, whether expressly or impliedly, secures or participates in the republication of a defamatory imputation is liable for such republication. Thus, if a person *gives an interview to press reporters intending that the substance of the interview should be published in their respective newspapers*, and the newspapers publish those statements, not necessarily in precisely the same words but adhering to the sense and substance of them, the individual making them will be *liable not*
I *merely for slander in publishing them to the reporter but for libel in that he authorised the publication which subsequently was made in the newspaper itself.*

[39] The said authors cited the case of *Parkes v Prescott and another* (1869) LR 4 Exch 169 and quoted a passage from the judgment, which reads:

Where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher. If the law were otherwise it would in many cases throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the same shelter of intermediate agents.

[40] In the present case, D admitted under cross-examination that he caused the publication of the impugned statement in the six Chinese newspapers and the English daily. He convened the said press conference. He spoke at length in the presence of the members of the press who were present therein. He must have been aware that his words were recorded. By convening a press conference and making a speech with full knowledge that his statements were recorded by the members of the press, D intended to have his statements reported in the newspapers, whose reporters were present at the said press conference. He is therefore liable for defaming P through the publications in the Chinese newspapers and the English daily.

THE SAID PRESS CONFERENCE HELD BY THE DEFENDANT ON 18 OCTOBER 2023

[41] In his evidence-in-chief, D explained the reason for holding the said press conference on 18 October 2023:

Numerous media approached the Chamber for comments on the special report by The Edge Malaysia. Therefore, the Chamber convened the Press Conference on 18.10.2023 (see the transcript of the Press Conference dated 18.10.2023 at pages 117–145 of Common Bundle of Documents (Volume 2) in Enclosure 21). The Press Conference dated 18.10.2023 was chaired by the Chamber's President Datuk Seri Hong Yeam Wah, and I merely supplemented the press statement of the Chamber's president.

[42] During cross-examination, D's explanation is this:

So, in July we have sent a letter to the CM and asked for the explanation, so if the CM had replied and explained in his reply and also do the open tender then, then there would be the right thing to do. But his response is he doesn't care about our letter, he did not answer to our question specifically and there was also this 0 gearing. There is no due diligence done, there is no evaluation as to the deal. And for such a small company who only has RM10 million paid-up and want to do a RM10 billion development, it doesn't have the capacity to handle this land deal for the Batu Kawan. And also, in the CM's testimony yesterday, he has also said that he did not read the Chamber's letter and it was the PDC who prepared the letter for him to sign, we already knew this from the very beginning. And also, for the whole land deal, you must answer to the Edge's queries, because the Edge is a reputable financial

A and commercial newspaper, not only in Malaysia, in Singapore and also in Hong Kong.

B [43] The commonality between both reasons above is that they allude to events that existed before the termination of the JDA. Recall that the termination was announced by the PDC on 16 October 2023, which is two days before the said press conference on 18 October 2023.

C [44] D submits that despite the termination of the JDA and the decision of the PDC to go for an open tender, there are numerous issues related to the BKIP 2 project which remain unanswered by P and the PDC. These issues include: (i) the perceived lack of transparency and governance in the way the PDC handled the BKIP 2 land deal; (ii) why did the PDC choose Umech Construction, which was said to be financially backed by Dubai investors as its original partner, only to subsequently sign the JDA with Umech Land, a company which Sunway Bhd became the majority shareholder two days before the JDA was signed; (iii) why Sunway Bhd entered the BKIP 2 land deal through the back door two days before the JDA was signed as P has been saying that he is not aware of the involvement of Sunway Bhd until Sunway Bhd announced to Bursa Malaysia; (iv) on 3 October 2023, P announced that a committee was set up to examine Umech Construction's proposal and as a result of the committee's finding, Umech Construction's proposal was presented to the PDC board for approval. But later, two committee members made a joint statement that the meeting held on 28 November 2022 was not a due diligence meeting to evaluate the BKIP 2 land deal. They also said that P's explanation is misleading, unfair and causes harm to their professional reputation; (v) why Umech Construction/Umech Land was chosen by the PDC to be the partner for the JDA despite they do not have the necessary financial capability and expertise; (vi) whether the PDC's board has been misled to think that Umech Construction and Umech Land are the same because they have the same directors and shareholders; and (vii) why the PDC decided to take a different path for the BKIP 2 project instead of developing the BKIP 2 land on its own as it did on BKIP 1.

H [45] D contends that even though there were a lot of red flags raised by the Chamber as well as the public, neither the PDC's announcement dated 16 October 2023 nor P's press conference on 3 October 2023 explained the abovementioned issues, which were not addressed in the PDC's letter dated 25 August 2023. Hence, in light of P's and the PDC's nonchalant attitude toward the shortcomings discovered by various parties in the BKIP 2 project, it became the legal, social and moral duty of the Chamber to convene the said press conference with the following objectives: (i) to highlight the issues arising from the BKIP 2 project; (ii) to call for clarification from the PDC and P regarding the controversies of the BKIP 2 project; (iii) to urge P to reorganise

the management of the PDC; (iv) to propose constructive recommendations to the PDC and P so that the same blunder committed in the BKIP 2 project will not happen again; and (v) to answer the media who sought for the comments of the Chamber or D on the BKIP 2 project.

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[46] Nevertheless, whatever laudable reasons D may have had to convene the said press conference, there is no cause for him to single out P for public humiliation by describing him as incompetent, ignorant and shameless. It is indisputable that the PDC is a corporate body with its distinct legal personality. As a separate legal entity, the PDC is responsible for its actions. The decisions in respect of the actions taken by PDC are made by its board of directors. P is not the PDC. He is not the alter-ego of the PDC. He is not the sole decision-maker on the actions taken by the PDC. P is the chairman of the PDC. And in that capacity, he is the PDC's spokesman.

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[47] The Chamber was aware of this position when it issued the two letters dated 27 July 2023 and 19 September 2023. The Chamber raised its concerns with the PDC. The Chamber was critical of the JDA which the PDC entered with Umech Land. The explanation which P gave to the Chamber vide the letter dated 25 August 2023 on the various complaints about the BKIP 2 project was an explanation given on behalf of the PDC. P was not making the statement on his own accord, but on behalf of the PDC. He was the representative of the PDC. Whatever actions taken by the PDC in respect of any transactions are based on the collective decisions of the board of directors. P alone is not the sole decision-maker for the PDC.

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[48] In view of the foregoing, there is no basis for D to smear P with the three offensive words. There is nothing constructive in humiliating the Chief Minister of Penang by describing him as incompetent, ignorant and shameless. The impugned statement has no place in a press conference that was supposedly held to talk about a development project which the PDC has aborted. Therefore, whether it is considered in isolation or in the context of the entire transcribed speech made by D at the said press conference, I find that the impugned statement bears the defamatory connotations complained by P.

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EVIDENTIAL VALUE OF THE EDGE ARTICLE

[49] In his testimony during examination-in-chief as well as in his statement of defence, D stated that the reason for convening the said press conference was due to an article published in *The Edge Malaysia* newspaper issue of 16 October 2023 ('said article'). There was a lot of hue and cry about the contents of the said article. Therefore, D, as the Lifetime Honorary President of the Chamber, was obligated to convene a press conference.

I

- A [50] This brings to the fore the evidential value of the said article. It is pertinent to determine the reliability of the said article since it appears to have necessitated D to call the members of the press. Preceding the impugned statement, D had said 'Jadi kami menggunakan The Egde punya report itu sebagai asas, satu asas yang sangat lengkap.'
- B
- C [51] In *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, Abdul Hamid Omar CJM (as the former Lord President then was) held that a newspaper report is an inadmissible hearsay evidence in the absence of any deposition by the journalist who authored it. His Lordship said (at p 65):
- D Before I consider the grounds, I would, in passing, observe that the sole foundation of the originating summons is the statement allegedly made by the Sultan as reported in the *New Straits Times* and *The Star* newspapers on July 27, 1987. There is no affidavit before the court affirmed to by the reporter concerned stating that he heard the Sultan made such statement. The *press reports* of what the Sultan is reported to have said would appear to be *inadmissible as hearsay*. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well-established that inadmissible evidence does not become admissible by reason of a failure to object.
- E [52] In *Malayan Banking Bhd v Yeo Sun Tong* [1999] 6 MLJ 377 at p 387, Augustine Paul J (later FCJ) ruled:
- F Newspaper articles must be proved in accordance with s 81 of the Evidence Act 1950 and the court cannot take judicial notice of them.
- G [53] In the present case, the said article, as well as several other articles of the same newspaper, are placed under Part B of the Common Bundle of Documents. This means that the said article is only admitted as to its authenticity. However, the contents of the said article are disputed. Therefore, unless and until the individuals who authored the said article have taken the witness' stand at the trial, the contents of the said article remain unproven.
- H [54] The said article appears to have been authored by two individuals. They were not called by D to testify. Their names can be seen on the said article itself. In the absence of any evidence from the authors, the contents of the article remain unproven. The contents are inadmissible hearsay statements in so far as its truth is concerned.
- I [55] Further, the said article has the semblance of a commentary column. In other words, the said article is not a news report but rather an opinion write-up. An opinion evidence is inadmissible unless it fulfils the criteria stipulated in ss 45 and 46 of the Evidence Act 1950. The said article does not fulfil the criteria.

[56] Moreover, the said article contains statements of hearsay nature purportedly made by unknown person(s), whom the authors of the said article referred to as the 'source'.

A

(a) at the third column from the left under the sub-heading 'Was the PDC Board misled?' (at p 18), it reads 'A source familiar with the matter tells The Edge ...', without revealing the identity of the 'source';

B

(b) at the last paragraph under the same column and sub-heading, it reads 'The source also points out ...'. Again, no disclosure of the identity of the 'source';

C

(c) at the extreme right column in the fourth paragraph, it reads 'Another source tells The Edge ...'; and

(d) under the sub-heading 'PDC needs to maintain control and quality of industrial parks', the entire contents appear to be quotes from unknown person(s).

D

[57] I conclude that the said article, which D attached considerable importance as something highly reputable, is nothing more than an opinion write-up peppered with hearsay statements. The said article is unreliable and inadmissible in so far as the truth of its contents is concerned. The said article has little evidential value.

E

THE TERMINATION OF THE JOINT DEVELOPMENT AGREEMENT

F

[58] From the get-go, the Chamber had misgivings about the BKIP 2 project. This is mirrored in the Chamber's letter dated 27 July 2023. When the PDC announced on 21 September 2023 of its intention to enter into a joint development agreement with Umech Land, the Chamber's concern intensified. The Chamber held a press conference on 3 October 2023 to air its discontentment about the BKIP 2 project.

G

[59] P concedes that the existence of the JDA and the BKIP 2 project are matters of public concern. Not only the Chamber but any concerned citizen is entitled to voice their views. The gravamen of the Chamber, as can be gauged from the correspondences with the PDC, are that: (i) there was no open tender process that preceded the award of the contract by the PDC to Umech Land; and (ii) Umech Land was not a financially stable company to undertake such a huge project.

H

I

[60] I accept that while the JDA was in existence and the BKIP 2 project was geared to move ahead, the Chamber can be regarded to have valid reason to publicise its discontentment. But the BKIP 2 project did not materialise

A because the PDC terminated the JDA.

B [61] Through its media statement dated 16 October 2023, the PDC announced the termination of the JDA and stated the reasons for the termination. In addition, the PDC announced that it would place advertisements in the media to invite potential investors and interested parties to tender a request for proposal for the development of its land, which was the subject matter of the JDA earlier. In short, there will be no joint venture project with Umech Land. Further, any future development on the land would be preceded by an open tender process to select the suitable contracting partner.

C [62] The media statement of the PDC that was issued on 16 October 2023 was reported in the mainstream media on 17 October 2023. Thus, by 17 October 2023, it has become public knowledge that the JDA was terminated and the BKIP 2 project will not be carried out. The public also knew that the PDC will initiate an open tender process to attract potential investors or interested parties for purpose of any project over the land in future.

E [63] The Chamber ought to have been pleased with the turn of events. The misgivings it has publicly expressed came into fruition. From the standpoint of the Chamber, the PDC has done the right thing by terminating the JDA and then calling for a request for proposal from interested parties for the development of its land. The Chamber's call for an open tender process appears to have been heeded.

F [64] Logically therefore, whatever concerns that have been raised as regards the PDC's joint venture with Umech Land have been laid to rest. These issues died with the termination of the JDA. It would be a futile endeavour for any party to harp on the issues related to the JDA that has ceased to exist.

G [65] In cross-examination, D conceded that whatever complaints the Chamber had in respect of the BKIP 2 project have been put to rest upon the termination of the JDA. He confirmed his awareness of the termination of the JDA at the time when the said press conference was held. He admitted that at the time when the press conference was convened on 18 October 2023, the BKIP 2 project which the Chamber was critical about was no longer in existence.

H [66] In the upshot, when the JDA was terminated, the concerns of the Chamber in respect thereof have ceased to exist. There was no need to convene a press conference to discuss the non-existent BKIP 2 project. This is added by the fact that the PDC has decided to pursue the path of an open tender process for any future development of its land. D and the members of the Chamber were aware of that. Therefore, what is the necessity to convene a press

conference to talk about something which is never going to happen?

A

[67] The reason given by D appears to be hooked on the said article published in *The Edge* on 16 October 2023. He states that after the said article was published, 'the issues arising from and related to BKIP-2 project were simmering in the public sphere'. He claims that 'numerous media approached the Chamber for comments' about the said article. Therefore, according to D, the said press conference was held 'with the primary objective of discussing the BKIP-2 issues'. Then, under cross-examination, D explained that he uttered the three offensive words against P because 'plaintiff must answer to *The Edge*'s queries, because *The Edge* is a reputable financial and commercial newspaper, not only in Malaysia, in Singapore and also in Hong Kong'.

B

C

[68] D's reason for convening the said press conference is unconvincing. Firstly, he appears to be relying totally on the said article. But the said article has no evidential value, as discussed earlier. Secondly, the said article made no mention of the fact that the JDA has been terminated and the BKIP 2 project would not materialise. It is apparent from its contents that the authors of the said article wrote it on the assumption that the JDA was still in existence and the BKIP 2 project was geared to proceed. The said article is dated 16 October 2023. The official announcement by the PDC regarding the termination of the JDA was on 16 October 2023. The announcement was reported in the mainstream media on 17 October 2023.

D

E

[69] It is plain that the said article was written by the authors without any knowledge of the termination of the JDA. The authors of the said article may have written it earlier before its publication on 16 October 2023. That might explain why an important news as the termination of the JDA was not even mentioned at all in the said article.

F

[70] In short, the said article, which D heavily relied upon, is a stale article. By the time the said press conference was convened on 18 October 2023, the termination of the JDA was already news in the public domain. This invariably means that the said press conference was convened to talk about some issues mentioned in a stale article in respect of a subject that is no longer in existence. Clearly, there was no necessity to convene the said press conference. And a fortiori, there is no justification for D to call P incompetent, ignorant and shameless. This brings us to the issue of justification.

G

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THE DEFENCE OF JUSTIFICATION

I

[71] The relevant principles pertaining to the defence of justification may be summarised as these:

- (a) the defence of justification constitutes a complete defence for a

- A defendant in a defamation suit. The question of malice is irrelevant;
- (b) the burden of establishing the defence of justification is on the defendant who pleads and raises this defence;
- (c) the burden of proof is to be discharged on a balance of probabilities;
- B (d) in order to succeed on the defence of justification, the defendant must prove that the defamatory imputation is true. The burden does not lie on the plaintiff to prove that the defamatory words are false, because the law presumes this in his favour; and
- C (e) the defendant must prove the truth of the imputations. It does not suffice for him to merely say that he believed the imputation to be true.

D [72] See the Supreme Court decision in *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233 the Court of Appeal decision in *Dr Chong Eng Leong v Tan Sri Harris bin Mohd Salleh* [2017] 4 MLJ 611; [2017] 10 CLJ 657 the High Court decision in *Abdul Rahman v Bre*.

E [73] It is my finding that D has failed to establish the defence of justification. The sting of the defamation in the impugned statement rests on the three offensive words. The defamatory imputation is that P, as the Chief Minister of Penang, is incompetent, ignorant and shameless. Considering the circumstances under which the impugned statement was uttered, D is not justified in describing P in those terms. To wit:

- F (a) it was at a press conference convened on 18 October 2023;
- (b) the said press conference was called to purportedly discuss matters raised in a stale article. Namely the said article dated 16 October 2023;
- G (c) at the time when the said press conference was held, the PDC had already terminated the JDA, whereby announcement of this news was made two days prior to that;
- (d) at the time of the said said press conference, the BKIP 2 project which the Chamber was very critical about was no longer in existence;
- H (e) the PDC has also announced, through the same media statement dated 16 October 2023, of its intention to pursue the path of an open tender process; and
- (f) D was aware of the termination of the JDA.

I [74] D submits that the justification for the impugned statement was not derived from the said article alone. Instead, it was supported by true facts drawn from his study of the issues surrounding the BKIP 2 project. His justification for the impugned statement is substantiated by: (i) the two letters

dated 27 July 2023 and 12 September 2023 from the Chamber; (ii) the letter dated 25 August 2023 from P; (iii) CTOS corporate reports of Umech Construction and Umech Land; (iv) a press statement dated 7 October 2023 by Aspen (Group) Holdings Ltd; (v) a press release dated 10 October 2023 by DW2 (Prof Dr P Ramasamy Palanisamy, the former Deputy Chief Minister of Penang II); (vi) announcements dated 27 September 2023 and 5 October 2023 by Sunway Bhd; (vii) P's press statements dated 3 October 2023 and 9 October 2023; and (viii) the PDC's announcement dated 16 October 2023.

[75] D contends that his description of P as incompetent, ignorant and shameless is a correct conclusion drawn from the following proved facts. To wit: (i) the BKIP 2 project was awarded to Umech Construction/Umech Land by way of direct negotiation, and not through a public tender process; (ii) there was a lack of understanding on Umech Construction's/Umech Land's financial capability; (iii) there was no transparency and fair selection process in the selection of Umech Construction/Umech Land as the joint collaboration partner to develop the BKIP 2 project; (iv) there was a sudden change of the joint collaboration partner to a dormant company; (v) there was false representation on the identity of the joint collaboration partner; (vi) the sale of the PDC's land was at below market price without a proper valuation; and (vii) P's failure to lead the PDC with good governance and CAT (Competency, Accountability and Transparency) principles.

[76] No doubt those were the concerns raised by the Chamber in their letters dated 27 July 2023 and 12 September 2023. But that is water under the bridge. D admitted under cross-examination that from his perspective, the PDC did the right thing when it terminated the JDA and initiated an open tender process. Therefore, D had no justification to accuse P of being incompetent, ignorant and shameless. Even if the JDA was a mistake on the part of the PDC, this has been superseded by an important event, which is the termination of the JDA. At the time of the said press conference, there was no justification for D to make the impugned statement.

[77] D invokes s 8 of the Defamation Act 1957, which reads:

In an action for libel or slander in respect of words containing *two or more distinct charges* against the plaintiff, a defence of justification shall not fail by reason only that the *truth of every charge is not proved* if the *words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges*.

[78] Section 8 of the Defamation Act 1957 can be resorted to if the impugned statement made by D contains several charges which are distinct from one another. And the unproven charge does not materially injure P's reputation.

A [79] In the present case, D has failed to prove the truth of the defamatory connotations borne by the impugned statement. There is no justification for D to utter the three offensive words which constitute the sting of the defamation.

B [80] Section 8 of the Defamation Act 1957 would be applicable if the defamatory imputations have been partly proven to be true, while the unproven imputation does not materially injure P's reputation. But that is not the case here. D's dependence on s 8 of the Defamation Act 1957 is misplaced. In the upshot, the defence of justification pleaded by D fails.

C THE DEFENCE OF FAIR COMMENT

D [81] The elements that constitute the defence of fair comment are that: (i) it must be an expression of opinion, and not a statement of fact; (ii) the expression of opinion must be based on facts truly stated; (iii) the expression of opinion must be on a matter of public interest; and (iv) the comment must be fair under the circumstances.

E [82] See the Federal Court decision in *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Mohd Rafizi bin Ramli* [2022] 3 MLJ 758; [2022] 5 CLJ 487 the Court of Appeal decisions in *Mohd Rafizi bin Ramli v Dato' Sri Dr Mohamad Salleh bin Ismail & Anor* [2019] 6 MLJ 587; [2020] 1 CLJ 498; *Tony Pua Kiam Wee v Dato' Sri Mohd Najib bin Tun Hj Abdul Razak* [2018] 4 MLJ 192; [2018] 3 CLJ 522; *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242; [2014] 3 CLJ 560.

The impugned statement is not a comment

G [83] D asserts that the impugned statement is his comment on the manner in which P, as the chairman of the PDC, handled the BKIP 2 project. It is his opinion that P is incompetent, ignorant and shameless when undertaking the BKIP 2 project. Besides, the use of phrases like 'saya rasa' (I feel) and 'kelihatan' (appears) indicate that D was expressing his view rather than making a factual statement. I disagree.

H [84] When D uttered the impugned statement, he was not expressing an opinion or commenting on anything. He was making an allegation of fact on the character of P. He accused P of being incompetent, ignorant and shameless. I
I The accusation was made in the context of P's position as the Chief Minister of Penang. As such, the impugned statement made by D does not qualify as comment.

The impugned statement is not based on facts truly stated

[85] Even if it is regarded as a comment, the impugned statement is not based on facts truly stated. On this aspect, the Federal Court decision in *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Mohd Rafizi bin Ramli* is instructive. The Federal Court said (at p 779 (MLJ); p 511 (CLJ)):

A

In my view, the key principles that may be extracted from the above discussion are, first, in relying on the defence of fair comment the respondent *must establish a sufficient substratum of facts upon which he draws inferences*. Secondly, those facts on which the comment or inferences were made must be truly stated so that the readers may form their own opinion whether the comment or inferences were well founded. This is consistent with Joshua Benjamin that the comments made on inference of fact must be true facts ...

B

C

...

However, *the substratum of facts relied upon by the respondent in making his comments must be true and existing*. It is as what Joshua Benjamin stated, that 'a writer may not suggest or invent facts and then comment upon them, on the assumption that they are true'. In other words, a plea of fair comment is not available to the respondent if the respondent invented or created the facts he intended to rely.

D

[86] In order to erect the defence of fair comment, D should have laid the foundation made of sufficient substratum of facts. These facts must be true. Here, no substratum of facts has been established by D to support the defence of fair comment. The harsh words which make up the sting of the defamation are not based on any facts truly stated. As repeatedly underscored, the subject for which the said press conference was convened was no longer in existence. The said article published in *The Edge* issue of 16 October 2023 is a stale article.

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[87] The only facts in existence at that time were: (i) the JDA was already terminated by the PDC, whereby an announcement to that effect was made two days prior to the said press conference; (ii) the BKIP 2 project, which involved a sale of the PDC's land to Umech Land, was already aborted; and (iii) the PDC decided to embark on the process of an open tender with a view to select suitable investors and partners in the future development of its land.

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[88] As held by the apex court in *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Mohd Rafizi bin Ramli*, 'the substratum of facts relied upon by the respondent in making his comments must be true and existing'. Here, since the BKIP 2 project ceased to exist upon the termination of the JDA, there was no substratum of facts which were true and existing at the time of the said press conference from which D could draw inference in support of the defence of fair comment.

I

The impugned statement is not a matter of public interest

- A [89] D asserts that the impugned statement concerns the management of the PDC and P (as the chairman of the PDC) in the BKIP 2 project. The BKIP 2 land was acquired by using public fund and taxpayers' money. The BKIP 2 project is a high impact state project for the purpose of attracting local and foreign investments. Given the use of public resources and the role of the PDC and P, the BKIP 2 project is a matter of public interest which may affect the people at large.

- C [90] That's all well and good. But as underscored earlier, the said press conference was convened to discuss on a subject that is no longer in existence. D alluded to a stale article from *The Edge* to launch his attack on P. At the time of the said press conference, the JDA had already been terminated and the BKIP 2 project ceased to exist. Public interest is not served by having a discourse on something that does not exist or about events of the past. Hence, there is no public interest element associated with the impugned statement.

The impugned statement is not fair

- E [91] D claims that before making the impugned statement, he had taken adequate steps to verify the information regarding the BKIP 2 project from P by writing the two letters dated 27 July 2023 and 12 September 2023, and convening a press conference on 3 October 2023. He had even taken his own initiative to conduct CTOS search and other relevant study on the BKIP 2 project. Hence, he had good reason to think that the information published to the public at the said press conference was reliable and true. By writing letters, convening press conference and conducting research, he had done what he could to check the veracity of the information regarding the BKIP 2 project.

- G [92] But having admitted that the PDC did the right thing to terminate the JDA and initiate an open tender process for the development of its land, it is not fair for D to accuse the PDC's chairman of being incompetent, ignorant and shameless. Moreover, D admitted that after the termination of the JDA, whatever issues the Chamber had with the BKIP 2 project were laid to rest. All the more why it is unfair for D to revive the issues just to make the impugned statement. No fair minded person would have honestly described the Chief Minister of Penang in the manner that was done by D through the usage of the three offensive words. In the premises, the defence of fair comment cannot avail to D.

I THE DEFENCE OF QUALIFIED PRIVILEGE

[93] The defence of qualified privilege would avail to a defendant in a libel suit if the words complained of were made on a privileged occasion. According to the UK House of Lords in *Adam v Ward* [1917] AC 309; [1916–17] All ER

Rep 157, a privileged occasion is:

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... an occasion where the person who makes the communication has an *interest or a duty*, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a *corresponding interest or duty* to receive it. The *reciprocity is essential*.

B

[94] The Court of Appeal in *Bre v Abdul Rahman* (at p 492 (MLJ); p 8 (CLJ)) cited with approval a passage from the judgment of the English Court of Appeal case of *Blackshaw v Lord and another* [1983] 2 All ER 311, which states:

C

Public interest and public benefit are necessary ... but not enough without more. There must be a *duty to publish to the public at large* and an *interest in the public at large to receive the publication*; and a section of the public is not enough.

D

[95] Thus, the starting point to consider whether a defendant may rely on the defence of qualified privilege is to determine whether he had any duty or interest to make the words complained of. If he had no such duty or interest, then the defence of qualified privilege cannot stand.

E

[96] The next step is to ascertain whether the person(s) to whom those words were communicated had a corresponding interest or duty to receive them. If the person to whom the statement was made had no such interest or duty, equally the defence of qualified privilege fails. The element of reciprocity must exist to sustain this defence (see the Court of Appeal decision in *Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas & Ors* [2018] 12 MLJ 98; [2018] 10 CLJ 222).

F

The impugned statement was not made on a privileged occasion

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[97] It bears reiterating that when the said press conference was convened on 18 October 2023: (i) the JDA had already been terminated; (ii) the BKIP 2 project involving Umech Land would never materialise; (iii) the PDC had decided to initiate an open tender process for the development of its land by advertising for a request for proposal to collaborate with the PDC to develop the land; (iv) all the above have been announced by the PDC via its media statement on 16 October 2023 and reported in the mainstream media on 17 October 2023; and (v) D and his fellow members in the Chamber were aware of the termination of the JDA and the PDC's intention to pursue the path of an open tender process for the development of its land.

H

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[98] By holding a press conference to speak about a project that is no longer in existence, D was flogging a dead horse. The report published in *The Edge* newspaper which prompted the need for the said press conference was

- A actually a stale article. The said article made no mention about the termination of the JDA, which is indicative of the fact that its authors were unaware of this significant event.
- B [99] The public at large do not have any legal, moral or social interest on matters concerning past events. The public has no duty of being informed of matters concerning a non-existent subject. There was a proposed project which led to a joint development agreement between the PDC and a private company. There were a lot of questions circling this subject. But at the end, the JDA was terminated and the BKIP 2 project ceased to exist. The PDC has embarked on a different approach, which is in line with the Chamber's wishes. Thus, it is time to move on and not be saddled with the past.
- C
- D [100] In the circumstances, there is no legal, moral or social duty on the part of D to communicate to the public at large the impugned statement he made. Whereby he assailed the credibility of the Chief Minister of Penang by describing him in those insulting terms. The public has no interest, be it legally, morally or socially, to hear the three offensive words hurled against the Chief Minister.
- E
- F [101] An analogy can be drawn from the High Court case of *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor* [1978] 1 MLJ 75. Where on the facts of the case, the learned judge held that the defence of qualified privilege will not avail to the defendant. The reason as stated by the learned judge (at p 78) is this:
- G Statements made on a subject matter in which both the defendant and the person to whom the statements are made have had legitimate common interest come under one of the classes of statements published on an occasion of qualified privilege ... but *since the publication in this case was made after the elections were over, the occasion was no longer privileged.*
- H [102] In the above case, the High Court found the occasion in which the defamatory statement was made was no longer privileged due to the passing of an event, which is the General Election. In similar vein, the occasion on which D made the impugned statement is no longer privileged because the subject for which the said press conference was convened was no longer in existence. I conclude that D cannot resort to the defence of qualified privilege in the present case.
- I REYNOLDS PRIVILEGE
- [103] In submissions, D also touched upon *Reynolds* privilege, which is a specie of the defence of qualified privilege. This defence was conceived in the judgment of the UK House of Lords in *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609. The UK House of Lords in that case promulgated

a concept known as ‘responsible journalism’ and articulated its essential factors. Among which are: (i) the seriousness of the allegation. Whereby the more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true; and (ii) the circumstances of the publication, including the timing.

A

B

[104] In *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187; [2015] 8 CLJ 471, the Federal Court expounded that the concept of responsible journalism, which is integral to the *Reynolds* privilege, is available as defence not only to members of the media but also to persons who hold press conference and make statements therein. Although D comes within the class of persons who may resort to the *Reynolds* privilege, on the factual matrix of the present case, I find that he is not entitled to invoke it.

C

[105] The impugned statement which contains the three offensive words is a serious accusation which assails P’s character, credibility and reputation. As stated by the UK House of Lords in *Reynolds v Times Newspaper*, the more serious the charge, the more the public is disinformed and the individual harmed. Aside that, the timing of the publication. The said press conference was held on the pretext of discussing something which will never take place. At the time D made the impugned statement, the subject of the so-called discussion was no longer in existence. Therefore, the *Reynolds* privilege relied on by D is a non-starter.

D

E

MALICE

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[106] Even if D had succeeded in proving the defences of fair comment and qualified privilege, I find that both defences would be defeated by malice.

[107] The Supreme Court in *S Pakianathan* explained malice in the following terms (at p 179 (MLJ); p 242 (CLJ)):

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Broadly speaking, express malice means malice in the popular sense of or *desire to injure the person* who is defamed. To destroy the privilege, the desire to injure must be the dominant motive for the defamatory publication. Knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests. The mere proof that the words are false is not evidence of malice, but proof that the defendant *knew that the statement was false* or that he had *no genuine belief in its truth* when he made it would usually be *conclusive evidence of malice*. If the defendant publishes untrue defamatory matter *recklessly without considering whether it be true or not, he is treated as if he knew it to be false*. In ordinary cases, what is required on the part of the defamer to entitle him to the protection of the privilege is honest belief in the truth of what he published. But if he was moved by hatred or a desire to injure and used the occasion for that purpose, the publication would be maliciously made even though he believed the defamatory statement to be true. Where the defendant

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- A *purposefully abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, malice may rightly be inferred:*
- B [108] In *Tun Datuk Patinggi Haji Abdul-Rahman Ya' Kub v Bre Sdn Bhd & Ors*, the High Court said (at p 413):
- C malice may also be inferred where the defendant's publication incorporated *defamatory matter which was not really necessary to satisfy the duty or protection of interest giving rise to the privileged occasion ... Malice may also be inferred from the terms of the communication itself*, as for example, where the language is unnecessarily too strong for the occasion and circumstances.
- D [109] The Court of Appeal in *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* said (at p 255 (MLJ); p 577 (CLJ)):
- E We are of the view that malice ... is a state of mind. Invariably, unless there is an express admission by the defendant that he has been malicious in his conduct, then the *presence of malice can only be deduced or inferred from the circumstances* obtaining in each case.
- [110] The UK House of Lords in *Horrocks v Lowe* [1975] AC 135 at p 145 and 150 posited:
- F If a man abuses a privileged occasion by making defamatory statements which he knows to be false, express malice may easily be inferred. If, on such occasion, he makes statements *recklessly, not caring whether they are true or false, again malice may be inferred. Such recklessness may be induced by anger,*
- G ...
- G Even a positive belief in the truth of what is published on a privileged occasion-which is presumed unless the contrary is proved-may not be sufficient to negative express malice if it can be proved that the defendant *misused the occasion* for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the *dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will* towards the person he defames. If this is proved, then even positive belief in the truth of what is published will not enable the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled.'
- H
- I [111] The legal propositions that can be distilled from the above authorities may be enumerated as follows:
- (a) malice is a state of mind, and thus more often than not, can only be established by inference drawn from the circumstances of each case;

- (b) express malice is attributed to the defamer's desire to injure the defamed person; A
- (c) when a person makes a defamatory statement which he knows to be false, malice can be inferred;
- (d) when a person recklessly makes a defamatory statement, without giving due regard as to whether it is true or false, malice can be inferred; B
- (e) malice can be inferred if the recklessness in making the defamatory statement is induced by anger;
- (f) malice can be inferred if the defendant's speech incorporated defamatory words which are not necessary to the occasion; and C
- (g) malice can be inferred if from the terms of the communication itself, the language is unnecessarily too strong or the words used are exceptionally harsh. D

The situation between the parties

[112] Bearing the above in mind, I consider the situation between the parties. I accept that D has a history of antagonism towards P. The history relates to events that transpired months before he held the said press conference. I adopt the narrative offered by P, with which I concur. To wit: E

- (a) the Penang and Province Wellesley Silver Jubilee Fund ('Jubilee Fund') is a statutory body created and incorporated under the Penang and Province Wellesley Jubilee Fund Act 1965. The management of the Jubilee Fund is governed by the board of trustees of the Jubilee Fund; F
- (b) the chairman of the board of trustees is the Chief Minister of the state of Penang. By virtue of his position as the Chief Minister, P is ex-officio the chairman of the Jubilee Fund's board of trustees; G
- (c) D was one of the trustees in the Jubilee Fund's board of trustees. He held that position until 1 December 2023, which is the date he effectively resigned after tendering his letter of resignation dated 2 June 2023 ('resignation letter'); H
- (d) during his tenure as a trustee, D had proposed to develop a land which was owned by the Jubilee Fund. The proposed development project comprised the construction of six blocks of workers' hostels and one block reserved for amenities; I
- (e) in order to discuss the proposed development project, a meeting of the board of trustees was convened in April 2022. The meeting was attended by P, D and the other two trustees. During the meeting, P was briefed by the other trustees about the proposed development project and the terms and conditions of the agreements relating thereto;

- A** (f) the draft agreements expressly stated that the Jubilee Fund was not represented by solicitors. P also observed that the contemplated contract between the Jubilee Fund and the contractor was based on direct appointment, instead of a selection by way of an open tender process;
- B** (g) P instructed the State Legal Advisor to provide an opinion on the proposed development project and the contemplated contract in respect thereof. The draft agreements were forwarded to the office of the State Legal Advisor. The State Legal Advisor at that material time was PW2;
- C** (h) after the State Legal Advisor had provided his letter of opinion, P instructed his officer to communicate to the board of trustees for the Jubilee Fund to have its own solicitors representing it in the transaction related to the proposed development project. P's message was communicated to one of the trustees via email on 25 August 2022;
- D** (i) the board of trustees took no steps to appoint a firm of solicitors to act for the Jubilee Fund in the transaction related to the proposed development project. Instead, D forwarded a draft trustees' resolution for P's signature in May 2023. The draft trustees' resolution seeks to authorise D to 'make all decisions on behalf of the Corporation including but not limited to ...
- E** (b) approving and finalising the terms and conditions of any written agreements'. P did not sign the draft trustees' resolution;
- (j) in view of the foregoing, no agreement was executed between the Jubilee Fund and the contractor who was to undertake the proposed development project. As a result, the proposed development project did not take off;
- F** (k) on 28 September 2022, D wrote a letter of the same date to P's officer. The contents of the letter were in relation to the development project he had proposed on the Jubilee Fund land. The tone and essence of the letter exuded his displeasure with the turn of events;
- G** (l) vide a letter dated 2 June 2023, D tendered his resignation as a trustee in the Jubilee Fund's board of trustees. At para 11 of the resignation letter, he berated P in these words:
- H** 11. To me, it seems like his actions were merely obligatory and perfunctory with fake promises. I am deeply disheartened by his actions as he has wasted all parties' time, effort and cost!
- I** If the CM choses to seek shelter and hide behind the uncalled-for official reply of the State Legal Advisor and the State Exco, and did not stand up and fight for what is good and beneficial to the elderly and poor, what more can he do for Penangites as a whole? Is this CM a man with all talks but with no positive actions?
- (m) the tenor of D's resignation letter appears to be an expression of his frustration against P for what he perceived as the latter's failure to endorse

the proposed development project. In essence, D decided to resign as a trustee because he was upset that a development project which he had proposed in respect of the Jubilee Fund land did not materialise. He laid the blame squarely on P.

A

Evidence of malice

B

[113] It is my finding that D was actuated by malice in uttering the impugned statement. I agree with P that malice can be inferred based on the following:

- (a) D's anger towards P never subsided. Hence, when an opportunity arose for him to publicly humiliate P in respect of an issue which was unrelated to the Jubilee Fund, D seized it;
- (b) a parallel can be drawn between what D said at para 11 of his resignation letter (which was reproduced above) and the impugned statement he uttered at the said press conference approximately four months later. In essence, both amount to scathing attack on the character of P in his position as the Chief Minister of Penang;
- (c) the circumstances under which the resignation letter was written might be different from that of the said press conference, yet the nature of the attack in both instances is the same. The attack is directed at the competency of P as a Chief Minister; and
- (d) the impugned statement D made at the said press conference and the statement he made in para 11 of his resignation letter bear similar connotations. Thus, when D uttered the impugned statement, it would not be wrong to postulate that he was echoing what he had said 4 months earlier in his resignation letter.

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[114] As observed by the Court of Appeal in *Mohammad Nizar v Sistem Televisyen*, malice is a state of mind and the only way this can be proved is by drawing plausible inferences from the factual circumstances. Here, the circumstances from which malice can be inferred are these.

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- (a) D was aggrieved by what he assumed to be P's refusal to approve his plan to develop the Jubilee Fund land. D's resignation from the board of trustees is the nett result of his ire towards P. Paragraph 11 of his resignation letter captures his sentiment on the matter;
- (b) D was aware of the PDC's decision to terminate the JDA, whereby the announcement was made through the PDC's media statement on 16 October 2023. He was also aware of the decision of the PDC to initiate an open tender process for the future development of its land. This was also announced via the same media statement;
- (c) yet, D proceeded to convene the said press conference on 18 October

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- A 2023, wherein the subject which he proposed to touch upon is the BKIP 2 project which was no longer in existence. The main pretext for convening the said press conference was to discuss about matters raised in a stale article, which is the said article published in *The Edge* issue of 16 October 2023;
- B (d) D was aware that the stale article made no mention about the termination of the JDA. Yet, the stale article was the purported reason to have the said press conference;
- C (e) as discussed earlier, there is no necessity for D and his fellow members of the Chamber to convene a press conference to speak about a non-existent subject. No public interest is served by such endeavour. Yet, D proceeded with the said press conference and launched his attack against P with the usage of the three offensive words;
- D (f) there is no logical reason for D to make the impugned statement at the said press conference and caused its publication in the newspapers. The only plausible inference that can be deduced from the circumstances surrounding the said press conference and the preceding chain of events is that D was induced by resentment towards P to utter the impugned statement;
- E (g) D had an axe to grind when he spoke at the said press conference. D's ill-will towards P, which crystallised from the Jubilee Fund episode, formed the real basis for holding the said press conference. In which he seized the opportunity to vent his personal grudge against P;
- F (h) in this regard, recall that the UK House of Lords in *Horrocks v Lowe* held that when a defendant is induced by anger to publish a defamatory statement, malice may be inferred. It expounded that 'where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill-will towards the person he defames', express malice is proven. It also opined that 'there may be evidence of the defendant's conduct upon occasions other than that protected by the privilege which justify the inference that upon the privileged occasion too, his dominant motive in publishing what he did was personal spite or some other improper motive, even although he believed it to be true';
- G
- H
- I (i) the foregoing passage is in sync with the narrative of the present case. The evidence of D expressing exasperation at P vide his resignation letter issued four months earlier justifies the inference that his dominant motive during the said press conference was to vent his personal spite against the latter;
- (j) D contends the primary objective of the Chamber convening the said press conference was to discuss the BKIP 2 project issues, as well as the

manner in which the PDC and P handled the BKIP 2 project. This is demonstrated by the President of the Chamber's introduction, where he emphasised that the focus was not on targeting politicians or individual companies, but on the procedures and processes involved in the BKIP 2 project;

- (k) even if there had been a legitimate reason to convene the said press conference, it was unwarranted for D to slander P by describing him in the terms of the three offensive words. If the real objective of the said press conference was to highlight matters related to the BKIP 2 project which the PDC has already aborted, the impugned statement is out of place. The three offensive words are outrageous for the occasion; and
- (l) on this aspect, the High Court in *Abdul Rahman v Bre* underscored that 'malice may also be inferred from the terms of the communication itself, as for example, where the language is unnecessarily too strong for the occasion and circumstances'. And the UK House of Lords in *Horrocks v Lowe* stressed the point that malice may be inferred 'where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the particular duty on the protection of the particular interest upon which privilege is founded'.

[115] On the evidence, I find that an inference of malice can be deduced on the part of D when he made the impugned statement. P has established on a balance of probabilities that D was actuated by malice when he uttered the impugned statement.

DAMAGES

[116] I turn now to damages. In assessing the quantum of damages, I considered the following.

[117] First, the award of damages must not be exorbitant or excessive. Damages should be compensatory and not punitive. The tort of defamation exists to protect, not the person or the pocket, but the reputation of the person defamed. In actions for defamation, damages are awarded to compensate the plaintiff for the injury to his reputation. They operate to vindicate the plaintiff to the public and to console him for the wrong done (see the Federal Court decision in *Lim Guan Eng v Ruslan* at p 572 (MLJ); p 244 (MLRA); p 199 (CLJ))).

[118] Second, the trend of damages awarded shows that it is no longer in the realm of millions of Ringgit. As remarked by the Court of Appeal in *Syed Nadri Syed Harun & Anor v Lim Guan Eng and other appeals* [2019] 4 MLJ 259 at p 275; [2019] 2 CLJ 631 at 649, 'the days of million Ringgit award for

- A defamation has long gone and consigned to history'. I think that sentiment remains valid, notwithstanding that the decision of the Court of Appeal was overruled by the Federal Court by a majority decision in *Lim Guan Eng v Ruslan*.
- B [119] In *Syed Nadri v Lim Guan Eng*, RM150,000 was awarded as a global sum for general and aggravated damages:
- C [33] Having given our due consideration, we agreed with learned defendants' counsel that the global award made by the learned trial judge was also *excessive and not in line with the trend of cases*. In *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394; [2012] 2 CLJ 619 despite the plaintiff being a Chief Minister of Penang and a finding of malice in that case, the award made was RM200,000.
- D [120] In *Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385, the Court of Appeal reduced the awards totalling RM1m to RM100,000. The following observation of the Court of Appeal is instructive (at p 395):
- E In the process of making our assessment we have not overlooked the *recent trend in this country of claims and awards in defamation cases running into several million Ringgit*. No doubt that trend was set by the decision of this court in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun*. It is a decision that has been much misunderstood. The underlying philosophy of that decision is that injury to reputation is as, if not more, important to a member of our society than the loss of a limb. But we think *the time has come when we should check the trend set by that case*. This is to ensure that an action for defamation is not used as an engine of
- F oppression. Otherwise, the constitutional guarantee of freedom of expression will be rendered illusory.
- G [121] Regarding the trend of damages, the Federal Court in *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133 at pp 185–186; [2018] 1 CLJ 145 at pp 207–208 set out a list as follows:
- H (a) *Dato' Ahmad Rejal Arbee & Anor v Mahfuz Omar* [2015] 6 CLJ 149. This case involved defamation against a politician. The Court of Appeal only granted RM110,000;
- I (b) *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569. The Court of Appeal only allowed an award of RM200,000 by way of global award of damages. And reversed the High Court decision in granting RM1.5m as damages;
- (c) *Dato' Musa Hitam v SH Al Attas & Ors* [1991] 2 CLJ Rep 487. The court only granted RM100,000 as damages for defamation;
- (d) *YB Dato' Dr Hasan bin Mohamed Ali lwn YB Mulia Tengku Putra bin Tengku Awang dan lain-lain* [2010] 8 MLJ 269; [2010] 7 CLJ 856. The

- court only granted the sum of RM50,000 despite the fact that the plaintiff was an Exco (politician); A
- (e) *Datuk Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad & Anor* [1984] 1 MLJ 97; [1983] CLJ Rep 521. At the material time the plaintiff was still the then Chief Minister of Sabah but the court only allowed RM100,000 in damages to the plaintiff; and B
- (f) *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394; [2012] 2 CLJ 619. The above mentioned involved a politician and also the Chief Minister of Penang. The court observed that global damages should be awarded to ensure that awards of monetary damages are not excessive and to avoid any double counting on the damages awarded. Despite this case involving a person of high ranking, the court decided to award RM200,000 as general and aggravated damages and costs of RM25,000 only. C D
- [122] Third, the various factors that should be taken into account in assessing damages were provided by the Federal Court in *Harris Mohd Salleh v Yong Teck Lee* (at p 186 (MLJ); p 209 (CLJ)). Namely: (i) the gravity of the allegation; (ii) the size and influence of the circulation; (iii) the effect of the publication; (iv) the extent and nature of the plaintiff's reputation; (v) the behaviour of the defendant; and (vi) the behaviour of the plaintiff. But these are not exhaustive. E
- [123] Fourth, when a defendant fails in his pleaded defence of justification, he is liable to pay the plaintiff a relatively higher sum of damages (see the Court of Appeal decision in *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* (at p 252 (MLJ); p 574 (CLJ))). F
- [124] I am conscious that damages for defamation are 'at large'. There is no fixed scale or formula. Each case is to be decided on its own merits, based on its own facts and circumstances. Be that as it may, I adopt the perspective advocated by the Federal Court in *Lim Guan Eng v Ruslan* (at p 573 (MLJ); p 246 (MLRA); p 200 (CLJ)). To wit, that damages for injury to reputation should not be greater than damages for personal injury claims. Or at least, a sense of proportion should be maintained between the two. G H
- [125] In the present case, there were seven libellous publications ie in six Chinese newspapers and one English daily. P requests RM300,000 for each libellous publication, totalling RM2.1m. He submits that each libellous publication stands on its own as distinct cause of action. Even so, I am not in favour of making a separate award for each and every publication or republication. I would take it all into consideration under the factor of the mode and extent of the publication. I

A [126] The other factors I took into account are: (i) the position and public standing of P as the Chief Minister of the state of Penang; (ii) the grave nature of the three offensive words; (iii) D's plea of the defence of justification and its pursuit at the trial, which failed; and (iv) the absence of remorse or regret on the part of D.

B [127] Having regard to the above, I award global damages in the sum of RM350,000 to P. In line with the practice to give a single award of damages, I would not make a separate award for aggravated damages. This is to ensure that awards are not excessive and to avoid 'double counting', as the circumstances giving rise to aggravated and general damages are usually inextricably intertwined (see the Court of Appeal decision in *Utusan Melayu (M) Bhd v Othman bin Hj Omar* [2017] 2 MLJ 800 at pp 815–816).

D [128] As for exemplary damages, I do not think it is warranted as there is no evidence that D made the impugned statement with a view to profit or to enrich himself (see the Court of Appeal decision in *Tradewinds Properties Sdn Bhd v Zulhikple bin A Bakar & Ors* [2019] 1 MLJ 421; [2019] 2 CLJ 261).

E APOLOGY

F [129] P prayed for an order to compel D to publish an apology. I decline to exercise my discretion to order an apology. There is no indication from D of any willingness to apologise to P. On the contrary, D has pleaded the defence of justification and testified that the impugned statement he made was justified. Willingness to apologise should be sincere and must be conceived in a contrite heart. It would be counter-productive to force a person to apologise when he is steadfast on his stand that the wrong he did was supposedly right (see the Court of Appeal decision in *Credit Guarantee Corp Malaysia Bhd v SSN Medical Products Sdn Bhd* [2017] 2 MLJ 629 at p 648; [2017] 6 CLJ 129 at pp 149–150).

CONCLUSION

H [130] On a balance of probabilities, I find that P has proven his claim for defamation against D. I further find, on a balance of probabilities, that D has not succeeded in proving his defences of justification, fair comment, and qualified privilege. I therefore allow P's claim and award the global damages as stated earlier. I award interest on the judgment sum at the rate of 5%pa from the date of judgment to the date of payment. I order D to pay costs of RM50,000 to P.

I

Plaintiff's claim allowed with costs.

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Reported by K Selvaraju

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